No. 90-1283

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD A. DENHOLM,

Petitioner,

v.

HOUGHTON MIFFLIN COMPANY

and

THE RIVERSIDE PUBLISHING COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE PARTIES

Pursuant to Supreme Court Rule 29.1, the parent companies and subsidiaries (except wholly owned subsidiaries) of respondents are: None.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1283

RICHARD A. DENHOLM,

Petitioner,

v.

HOUGHTON MIFFLIN COMPANY and
THE RIVERSIDE PUBLISHING COMPANY,

Respondents.

Respondents Houghton Mifflin Company and The Riverside Publishing Company respectfully submit this brief in support of their request that the Court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in Denholm v. Houghton Mifflin Co., 912 F.2d 357 (9th Cir. 1990).

STATEMENT OF THE CASE

Petitioner Richard A. Denholm filed a two-count complaint for tortious breach of contract and fraud in the Los Angeles Superior Court on April 23, 1985. Petitioner based his tortious breach and fraud claims on a two-page letter, which he alleged was an agreement by Respondents to publish, sight unseen, a mathematics textbook series to be written by him and others. Respondents properly removed the case to the District Court for the Central District of California on the basis of diversity jurisdiction. See 28 U.S.C. §§ 1332(a), 1441 & 1446.

The District Court dismissed the fraud count on Respondents' motion for judgment on the pleadings on statute of

limitations grounds. Respondents next moved for summary judgment on the tortious breach of contract count and the District Court granted it, giving Petitioner leave to amend his complaint to state an ordinary breach of contract count. Prior to trial, Respondents moved in limine to exclude as too speculative evidence concerning Petitioner's alleged loss of reputation and loss of future royalties from sales of textbooks that were in fact never written. The District Court excluded evidence on both of these elements of compensatory damages on the basis that the evidence was irrelevant and inadmissible under Federal Rules of Evidence 402 and 403. See Appendix I (January 7, 1987 Order Granting Defendants' Motion In Limine).

At trial, the only damages evidence Petitioner presented to the jury was his own testimony that the value of his time spent on the textbook project was $20,000. The jury awarded Petitioner $100,000, and, on Respondents' motion for a new trial and JNOV, the District Court ordered a new trial on the damages issue unless Petitioner accepted a remittitur to $20,000. Petitioner accepted the remittitur, the new trial order for respondents was rescinded, and an amended judgment for $20,000 plus costs was entered.

Denholm appealed the evidentiary rulings on the motion in limine as well as the dismissal of the fraud and tor-

tious breach counts.[1] Respondents filed a motion to dismiss the appeal on the grounds that, under this Court's decision in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (per curiam), and subsequent decisions of the Courts of Appeals, Petitioner's acceptance of the remittitur precluded his appeal. The panel of the Ninth Circuit Court of Appeals was unanimous that Donovan did not bar Petitioner's appeal of the dismissal of the fraud and tortious breach counts.

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[1] Petitioner's notice of appeal did not specify that he was appealing the fraud claim, but the Ninth Circuit considered that issue because it was briefed by the parties. Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359 n.1 (9th Cir. 1990). Denholm also appealed the judgment on the verdict and the amended judgment, and the Court of Appeals unanimously held that because he accepted the remittitur he could not appeal either judgment. Id. at 360; id. at 363 (Hall, J., concurring in part).

Denholm v. Houghton Mifflin Co., 912 F.2d 357, 361 (9th Cir. 1990); id. at 363 (Hall, J., concurring in part). The Court concluded that these two counts were "separate and distinct from the ordinary breach of contract claim resolved by the remittitur," were dismissed prior to the filing of the breach of contract claim, and required "different evidentiary showings" from the remitted claim. Id. at 361. Ruling on the merits, the court unanimously affirmed the District Court's dismissal of the fraud and tortious breach counts. Id. at 361-63; id. at 363 (Hall, J., concurring in part).

A majority of the panel held that Petitioner's acceptance of the remittitur prevented him from challenging the district court's pretrial evidentiary

rulings limiting the types of evidence of compensatory damages on the contract claim. The majority reasoned:

> [A]ll of this evidence relates to his single breach of contract claim for compensatory damages, which was resolved by remittitur. The evidence of lost royalties and loss of reputation is therefore not separate and distinct from the already litigated breach of contract claim for compensatory damages and, under such circumstances, acceptance of the remittitur must put an end to the litigation of this claim.

Id. at 360-61 (footnotes and citation omitted).

The dissent argued that an appeal should be allowed from an order completely unrelated to the remittitur order "in a functional sense." Id. at 366. The dissent stated that one could not "fairly characterize the in limine order as directly related to the remit-

titur order accepted" by the Petitioner. Id. at 365. The dissent suggested that the remittitur order addressed only the value of Petitioner's time spent on the textbook project and not the excluded evidence on the other asserted elements of compensatory damages for breach of contract. Id.

REASONS FOR DENYING THE WRIT

Petitioner has cited no "special and important reasons" warranting a grant of the writ of certiorari. Sup. Ct. R. 10. The decision below is consistent with this Court's decision in Donovan v. Penn Shipping Co., 429 U.S. 648 (1977). Furthermore, contrary to Petitioner's assertions, there is no conflict between the decision of the

Ninth Circuit below and the decision of any other United States Court of Appeals. The Petition alleges no other justification for review in this Court and there is in fact none.

I. The Ninth Circuit's Decision Is Consistent With Donovan And Earlier Decisions Of This Court

The rule applied by the Ninth Circuit in this case is consistent with the language and policy supporting this Court's decision in Donovan. In Donovan, the Court reaffirmed "the long-standing rule" that "a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." 429 U.S. at 650. The Court affirmed the Second Circuit's decision, which held that the plaintiff's accep-

tance of a remittitur of his judgment barred his appeal of the trial court's decision finding the damages verdict unsupported by the evidence and ordering remittitur or a new trial. Donovan v. Penn Shipping Co., 536 F.2d 536, 537-38 (2d Cir. 1976), aff'd, 429 U.S. 648 (1977).

The decision in Donovan confirmed the many early Supreme Court decisions preventing a plaintiff from appealing an accepted remittitur order. 429 U.S. at 649. The Court had previously made clear that a plaintiff agreeing to a remittitur, though he had valid grounds for appeal, "waive[s]" those rights "for the sake of obtaining immediate satisfaction of his claim" and "consent[s]" to the reduced judgment. Lewis v. Wilson, 151 U.S. 551, 555 (1894); see Wood-

worth v. Chesbrough, 244 U.S. 79, 82 (1917); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 52 (1895); Kennon v. Gilmer, 131 U.S. 22, 30 (1889). This rule barring appeals reflects the compelling interest in the finality of accepted remittitur orders. The plaintiff, having secured the benefit of immediate judgment by accepting remittitur, cannot "seek[] to retract the condition upon which it was obtained." Woodworth, 244 U.S. at 82; accord Koenigsberger, 158 U.S. at 52. As the Fourth Circuit concluded in analyzing Woodworth, this Court "was unwilling to permit a successful litigant to secure a conditional judgment and at the same time seek to retract the condition upon which that judgment was obtained." Call Carl, Inc. v. BP Oil Corp., 554 F.2d

623, 626 (4th Cir.), cert. denied, 434 U.S. 923 (1977).

In the present case, the Ninth Circuit applied Donovan in determining what parts of Petitioner's action was settled by his acceptance of the remittitur of the contract damages award. The court recognized that "a plaintiff may appeal from other parts of the judgment," even though he or she may not appeal that part settled by the remittitur order. Denholm v. Houghton Mifflin Co., 912 F.2d 357, 359-60 (9th Cir. 1990). Consistent with the policies underlying the longstanding practice of remittitur, the court stated that Petitioner could not appeal those parts of the judgment that were not "separate and distinct" from the remittitur order he had accepted. Id. at 360. The court concluded that

the evidentiary rulings on proof of compensatory damages were not sufficiently "separate and distinct" from the remittitur order on the contract claim, but that the fraud and tortious breach claims were distinct and permitted an appeal on those issues. Id. at 360-61.

Petitioner complains about the court's statement that the "separate and distinct" standard calls for an analysis of "whether each issue on appeal is a separate and distinct cause of action from the subject of the remittitur." Id. at 360. Yet this statement conflicts with neither Donovan nor this Court's earlier decisions. As discussed above, those decisions speak of a remittitur order as finally resolving a claim. See supra pp. 10-12. The Ninth Circuit in Denholm follows those deci-

sions by refusing to permit an appeal based on any claimed errors in the underlying judgment when the plaintiff has accepted a remittitur and thereby consented to that judgment.

The finality principles underlying Donovan and this Court's other decisions must mean that the plaintiff's settlement of a cause of action by accepting the benefits of remittitur waives appeal of possible errors in rulings on that cause of action. Here, the in limine rulings excluded as unreliable certain of the evidence concerning damages on Petitioner's contract claim. There is no principled ground for permitting Petitioner to appeal the in limine rulings without opening up to challenge on appeal most of the underlying rulings concerning the contract claim that were

made during the course of pretrial and trial proceedings. For example, an evidentiary ruling at trial excluding hearsay evidence supporting additional losses from the breach of contract could be challenged on appeal. Such a ruling would also satisfy Petitioner's verbal formulation that it "involv[e] totally different evidence, on remand, from the subject of the remittitur order," Cert. Pet. at 27, because the first jury would not have been permitted to consider that evidence.

The rule urged by Petitioner (and the dissent below, 912 F.2d at 366) would deprive remittitur orders of any meaningful finality. It would leave the parties uncertain as to what had been settled by the remittitur order, engendering additional appeals. Rather than

resolving this cause of action, compare Lewis, 151 U.S. at 555, under Petitioner's rule the remittitur order would only serve to enable Petitioner to seek a retrial where his contract damages would be guaranteed at a minimum of $20,000.

Petitioner's position is wholly incompatible with this Court's decisions, which speak of a remittitur order as finally resolving a claim and waiving all errors concerning that claim. See Koenigsberger, 158 U.S. at 52 (By accepting remittitur, plaintiff "waived all right to object to the order of the court."). This line of "unbroken precedents," Donovan, 429 U.S. at 649, none of which intimate that some exception to the bar of appeals exists, compel the conclusion that Petitioner cannot appeal

pretrial orders concerning the remitted contract claim. Petitioner's situation is not unique: he found himself in the same position as any plaintiff facing an order of a new trial or remittitur and, once he accepted the remittitur, Donovan barred his appeal on the contract claim.

Petitioner's contention that the decision forces pointless retrials is unpersuasive. Cert. Pet. at 29-30. The same argument was made in the Donovan case, 536 F.2d at 539 (Feinberg, J., dissenting), and rejected by the Second Circuit and this Court. 536 F.2d at 537-38 (2d Cir. 1976), aff'd, 429 U.S. 648 (1977). As such it is an attack on the rule in Donovan that appeals do not lie from remittitur orders, and must be rejected for the reasons previously given herein. On another level, the con-

tention makes no sense because remittitur can be offered only where a new trial would otherwise be ordered, and thus it allows a plaintiff to avoid a retrial rather than forcing such a result.

Moreover, two erroneous assumptions underlie Petitioner's spectre of pointless retrials. First, Petitioner assumes that a second jury would accept at face value his claim of the value of his lost time. Petitioner's only evidence supporting the $20,000 judgment was his own self-serving testimony of the value of his time. Cert. Pet. at 11, 29. Respondents would have the right to discredit that estimate on cross-examination before a jury at a retrial, placing Petitioner's $20,000 judgment at risk. As the Second Circuit recognized in Donovan, permitting a plaintiff to

appeal a remittitur order deprives the defendant of the "valuable" right "to have a second jury consider the issue of damages" where the first jury's verdict is excessive. 536 F.2d at 538; see Kennon, 131 U.S. at 30.[2]

Second, Petitioner incorrectly assumes that the same in limine rulings would invariably apply at a retrial. In granting the motion in limine, the judge wrote by hand on the order that it was

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[2] Contrary to Petitioner's assertion of pointless retrials, the Second Circuit in Donovan, 536 F.2d at 538, pointed to its earlier decision in Reinertsen v. George W. Rogers Constr. Corp., 519 F.2d 531 (2d Cir. 1975), in which it affirmed a judgment where the first jury verdict was $75,000, the plaintiff declined a remittitur that would have resulted in a $45,000 judgment, and the second jury awarded just $16,000. See Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972) (affirming judgment where first jury awarded $15,000, plaintiff declined remittitur to $5000, and second jury awarded no damages).

"subject to further order of the Court," see Appendix I, and on retrial Petitioner might have persuaded the District Court to reconsider its rulings. Such interlocutory orders are subject to revision prior to entry of final judgment, and there is no guarantee that as a general matter a second trial will be a mirror of the first. A retrial enables the District Court to further refine its rulings and permits the second jury to approach the case in a setting tempered by the lessons learned in the first trial. There is simply no basis for Petitioner's assumption that a retrial would be a pointless exercise.

II. There Is No Conflict In The Courts Of Appeals Concerning Appeals Of Remittitur Orders

The decision of the Ninth Circuit in the present case is consistent with the few circuit court decisions since Donovan involving appeals of remittitur orders that were claimed to have affected only part of a judgment. The decision below reflects the prevailing rule that a plaintiff accepting a remittitur order may appeal only those parts of the judgment that are "separate and distinct" from that part upon which the remittitur order is granted. See Lanier v. Sallas, 777 F.2d 321, 325 (5th Cir. 1985) ("separate and distinct from the underlying claim"); Aaro, Inc. v. Daewoo Int'l (America) Corp., 755 F.2d 1398, 1401 (11th Cir. 1985) ("an order completely unrelated to the remittitur or-

der"); Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 627 (4th Cir.) ("separate or divisible controversies"), cert. denied, 434 U.S. 923 (1977); cf. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 843-44 (7th Cir. 1978) (permitting appeal of denial of injunctive relief following remittitur on damages but not discussing basis for doing so), cert. denied, 440 U.S. 930 (1979).

Petitioner claims that there was no conflict in the Court of Appeals until the Ninth Circuit rendered its decision here. Cert. Pet. at 19-22. According to Petitioner, the Ninth Circuit's statement that the appealed-from ruling must relate to a separate and distinct cause of action from that remitted creates the conflict. Id. at 22-23. As previously shown, the Ninth Circuit's

statement is consistent with the decisions of this Court and thus, not surprisingly, does not create a circuit conflict.

Petitioner does not claim that the decision below conflicts with Call Carl, in which the Fourth Circuit permitted an appeal of the trial court's granting of a directed verdict on the antitrust count, even though acceptance of the remittitur order barred appeal of the fraud and deceit counts that were tried and remitted. The Fourth Circuit stated: "[W]e do not think that the reasons for prohibiting direct appeals from remittiturs require such a result with respect to entirely separate and distinct causes of action once a remittitur has been accepted on one count of a complaint." 554 F.2d at 627. Similarly,

here the Ninth Circuit permitted petitioner to appeal the dismissal of his claims for fraud and tortious breach while barring only his appeal concerning the issue of damages for breach of contract, which he in effect settled by accepting the remittitur.

Petitioner also does not claim a conflict between the present decision and the Fifth Circuit's recent decision in Lanier, nor is there one. There the Fifth Circuit ruled that a plaintiff's acceptance of a remittitur order on her medical malpractice count barred her appeal of the dismissal of punitive damages for medical malpractice (but did not bar appeal of the dismissal of a legal malpractice claim against another defendant). 777 F.2d at 325-26. Just as here, the Fifth Circuit reasoned that

the punitive damages claim was not sufficiently "separate and distinct" from the compensatory damages claim because it was dependent on establishing liability for compensatory damages and could not be tried in isolation, thus "acceptance of the remittitur must put an end to the litigation" over the medical malpractice claim. Id.[3]

There is also no conflict between Ohio-Sealy and the present case. In an attempt to suggest a parallel between the nonappealable evidentiary rulings on contract damages here and the Seventh

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[3] Notwithstanding the similarity of reasoning employed by the Fifth Circuit and the Ninth Circuit, and the Ninth Circuit's explicit adoption of Lanier's "separate and distinct" test, Denholm, 912 F.2d at 360, Petitioner admits that the Fifth Circuit's rationale in Lanier does not conflict with this Court's decision in Donovan. Cert. Pet. at 20-21.

Circuit's decision, Petitioner claims that in Ohio-Sealy "the determining factor was not separate causes of action but separate types of damages being sought." Cert. Pet. at 18. However, the court in Ohio-Sealy did not permit the appeal of a denial of one element or type of damages after a remittitur had been accepted on the underlying cause of action but, instead, permitted the appeal of a claim for injunctive relief.

The request for injunctive relief in Ohio-Sealy was clearly separate and distinct from the damages claim for the antitrust violation because, after the plaintiff had accepted a remittitur on damages, the trial court held hearings on the request for an injunction. 585 F.2d at 824, 844. This sequence of events shows that the remittitur order

could not have settled the later-decided injunctive relief claim. The court also noted that the claim for injunctive relief involved different elements than the claim for damages, further evidencing that the two were separate and distinct. Id. at 844. Finally, the claim for injunctive relief was an equitable matter reserved for decision by the judge and thus was separate and distinct from the remitted jury verdict.[4] In contrast, the present case involved a challenge to pretrial evidentiary rulings concerning the conduct of the dam-

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[4] The court noted that the request for an injunction did not require retrying issues settled by the remittitur order because, under established principles of collateral estoppel and the Seventh Amendment, see Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), the trial court could not reconsider issues decided by the jury in the earlier damages trial. 585 F.2d at 844.

ages trial on the contract claim -- a claim fully resolved by the remittitur order. See Lewis, 151 U.S. at 555.

Petitioner's attempt to tease a circuit conflict out of the Eleventh Circuit's decision in Aaro is equally unavailing. Petitioner admits that it is not clear from the Aaro opinion whether it involved a single cause of action. Cert. Pet. at 18 (asserting that it "apparently" involved a single cause of action). The Eleventh Circuit stated only that the order granting summary judgment for the claim for commissions on unshipped goods was "completely unrelated to the remittitur order" on the tried claim of commissions owed on shipped goods. 755 F.2d at 1401.

There is no conflict with Aaro because the test employed by the Eleventh

Circuit there would result in the same outcome here. The evidentiary rulings in the present case concerned what evidence could be relied upon to prove contract damages, which were the subject of the remittitur order, and thus those rulings are not "completely unrelated" to the remitted contract damages claim. Furthermore, because the Eleventh Circuit in Aaro did not specify how it would determine if claims were "completely unrelated" and did not discuss whether the unshipped goods were a separate cause of action from the shipped goods, it is impossible to conclude that the Aaro case conflicts with the Ninth Circuit's decision.

In short, the Ninth Circuit's decision was a correct application of Donovan and its predecessors and does not

create a conflict with any other United States Court of Appeals' decision. There is no reason for this Court to review the judgment or to disturb the finality of the remittitur order to which Petitioner consented.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: May 17, 1991.

Respectfully submitted,

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APPENDIX

APPENDIX I

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD A. DENHOLM, Plaintiff, vs. HOUGHTON MIFFLIN COMPANY, et al., Defendants.	)	Case No. CV-85-3538-AAH (Kx) [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION IN LIMINE

Having heard on December 15, 1986 the Motion in Limine filed by defendants Houghton Mifflin Company and The Riverside Publishing Company, the Court rules as follows [, subject to further order of the Court:][1]

1. As to Specification 1 of the Motion, seeking to exclude all evidence

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[1] Handwritten in original.

as to matters which took place after June 30, 1981, the Motion is denied.

2. As to Specification 2 of the Motion, seeking to exclude any evidence as to purported injury to plaintiff's reputation as an element of damage allegedly caused by defendants' supposed breach of contract, the Court grants the Motion, and finds and rules that such evidence is irrelevant and inadmissible under Federal Rules of Evidence 402 and 403.

3. As to Specification 3 of the Motion, seeking to exclude any evidence as to royalties or future income claimed to be lost by plaintiff from sales of the putatively authored work as an element of damage allegedly caused by defendants' supposed breach of contract, the Court grants the Motion, and finds

and rules that such evidence is irrelevant and inadmissible under Federal Rules of Evidence 402 and 403.

4. All evidence relating to the issues referenced in Specifications 2 and 3 of defendants' Motion in Limine as referenced in paras. 2 and 3 hereof is excluded and plaintiff is prohibited from offering any evidence relating thereto. Counsel for plaintiff is also instructed to refrain from referring to the excluded issues or evidence relating thereto in any remarks to the jury.

DATED: ~~December __, 1986~~ [January 7, 1987][2]

A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

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[2] Handwritten in original.

Presented By:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By William A. Masterson /s/
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